SEBASTIANO ROBERT PAVONE

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 1 Of 1985]
22 MAY 1985

CRIMINAL LAW AND PROCEDURE: *Offence of drug trafficking - Investigating officer denied using word "opium" at trial - Whether officer's credit could be impeached - Special Order under s. 121, Evidence Act - Procedure involved if there is such contradiction.*

The accused was charged with an offence of drug trafficking. At the trial, the investigating officer, under cross-examination, denied he had said at the original trial that his test of the offending exhibit recovered from the accused revealed that it was opium. He maintained that he used the word "opiate". Counsel for the accused applied to impeach the credit of investigating officer but the application was refused by the trial Judge. Counsel then applied for a Special Order under s. 121 of the Evidence Act to impeach the credit of the Officer concerned.

Held:

[1] That a certified true copy of the record of the original trial, which would include the observation of the Court regarding the testimony of the Officer, should remain uncontradicted.

[2] Once the certified copy of the record of proceedings in the original trial is produced and the Judge's attention drawn to the alleged difference between what the investigating officer had testified previously and now, the Judge will have to decide if it is material.

[3] If the difference is found to be material, then leave to cross-examine should be given.

[4] Since the record provided that the only explanation offered by the Officer is a denial that he used the word "opium" at the original trial, all that needs to be done is to put in the record at the original trial by calling the proper officer of the Court who has custody of the same, presumably, the Registrar, Sessions Court.

[Special Order refused.]

Cases referred to:
Ah Mee v. Public Prosecutor [1967] 1 MLJ 220
Public Prosecutor v. Madali Kutie [1915] 3 FMSLR 1
Brij Bulshan Singh v. R [1946] AIR PC 38
Mamand v. Emperor [1946] AIR PC 45
Muthusamy v. Public Prosecutor [1948] MLJ 57

Legislation referred to:
Criminal Procedure Code, ss. 226
Criminal Procedure Code, [Ind] s. 164
Evidence Act 1950, ss. 76, 79(1), 80, 91, 92, 121, 145(1), 155(c)

JUDGMENT

Edgar Joseph Jr J:

This application for a Special Order under s. 121 of the Evidence Act, 1950 ("the Act"), by the prisoner Pavone ("the Accused") charged with an offence of trafficking in a dangerous drug, to wit, 402 grammes of heroin arose out of certain events which occurred at his partly heard retrial in the Sessions Court which I had ordered for reasons which appear in my judgment reported in [1984] 1 MLJ 77.

These events may be stated thus: under cross-examination by Counsel for the defence, the Investigating Officer, who was one ASP Fariddudin bin Dato Ahmad (PW5), denied that he had said, at the original trial, that his test of the offending exhibit recovered from the person of the Accused revealed that it was opium. Indeed, he denied that he had even used the word "opium" on that occasion. He maintained that he had then said the same thing as he was saying now, namely, that "it was an opiate".

As a result, Counsel informed the Court that he intended calling the learned President who presided at the original trial for the purpose of impeaching the credit of this witness.

Upon being queried as to whether there was any provision authorising such an application Counsel replied "I shall try to make arrangements to have records available tomorrow."

Counsel was then queried as to whether it was going to be material even if the witness did say at the original trial that the substance concerned was opium. Counsel maintained that it would be.

The Court then refused the application to impeach the credit of the witness.

For a better understanding of the issues which arise upon this Application, I consider it necessary to quote from the record of proceedings, full particulars of this ruling by the Court. It reads:

> I do not agree with Counsel that this is material or relevant. Even if he did say it was opium he was in no position to say so with authority. His evidence is not to be relied on as to what the substance actually is or was. I would therefore disallow the application to impeach witness's credit on this ground.

The hearing proceeded and, in due course, the prosecution closed its case. The case was then adjourned to a date one week later when the Counsel announced that he was making no submission. The defence was then called and Counsel renewed his request to call the learned President who presided at the original trial to produce the transcript of the Notes of Proceedings of the witness ASP Fariddudin and especially of the observation made by the Court during the final addresses which reads:

> I have it down as "Opium' in the Court's records and we will have to go by that. It was repeated several times in testimony.

The request was, however, refused with the remark:

> I am of the view that this is barred by the provisions of s. 121 of the Evidence Act. The proper officer to call for the production of the records should be the Registrar. In any case, since the purpose of the records is merely to show that PW5 said it was "opium" in the earlier proceeding and in view of my ruling on Counsel's application earlier I still hold the statement to be irrelevant and refuse Counsel's application.

Counsel then responded by saying that he would be applying to the High Court for the necessary order and requested that in the meanwhile the hearing be adjourned.

This request the Court granted and adjourned the hearing, at first, to the 20 May 1985, and thereafter, to a date three days later.

When the application came before me I drew Counsel's attention to the provisions of s. 76 of Act, which provide for the admission of certified true copies of public documents which, of course, include notes of proceedings recorded in judicial proceedings.

I then told Counsel if this section is properly invoked and the certified copy of the proceedings at the original trial produced by calling the proper officer having custody of the records to produce the same then the presumptions under ss. 79(1) and 80 of the Act would arise.

Section 79(1) reads as follows:

> The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Malaysia who is duly authorized thereto;
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> Provided that the document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

Section 80 reads as follows:

> Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Judge, President of a Sessions Court or Magistrate or by any such officer as aforesaid, the Court shall presume that-
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> (a) the document is genuine;
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> (b) any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and
>
> (c) such evidence, statement or confession was duly taken.

I added that there are equally explicit provisions which state that the evidence of each witness shall be taken down in legible handwriting by the presiding officer of a Subordinate Court and shall form part of the record (see s. 267 of Criminal Procedure Code). This in turn would bring into play s. 91 of the Act which applies as much to criminal as to civil proceedings. So far as material to this case, it provides:

> In all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms ... of such matter except the document itself.

Similarly, s. 92 of the Act would operate to exclude all parol evidence seeking to contradict or vary what was set out in writing.

The effect of the above provisions would be the same as in the Federal Court case of *Ah Mee v. PP* [1967] 1 MLJ 220 namely, that a certified true copy of the record of the original trial, which would include the observation of the Court regarding the testimony of ASP Fariddudin, should remain uncontradicted. This, I pointed out to Counsel, was entirely in accord with the old case *PP v. Madali Kutie* [1915] 3 FMSLR 1, which is authority for the proposition that in a prosecution for perjury during a criminal trial the record is the only evidence admissible to prove the words used because s. 226 of the Criminal Procedure Code, 1902 (see s. 267 Cap. 6) imposes a duty on the Judge to take down the evidence in writing.

It goes without saying that there will also have to be proof of identity, that is to say, evidence *dehors* the certified copy of the record, showing that ASP Fariddudin is the selfsame person who gave evidence at the original trial.

The next point to note is this: it is clear from the notes of proceedings of the retrial that the learned President has taken the view that whether or not ASP Fariddudin had said at the original trial that his test revealed that the offending exhibit recovered from the person of Accused was opium was irrelevant since "he was in no position to say so with authority."

With respect, the competence of ASP Fariddudin to speak as to the nature of the offending exhibit although obviously relevant to the question whether his evidence or that of the chemist should be preferred by the Court, has no relevance whatsoever to the application for impeachment. It must be recognised that the record of proceedings at the original trial can only be used for the purpose of cross-examining ASP Fariddudin under the provisions of ss. 145(1) and 155(c) of the Act. It can on no count constitute substantiative evidence at the retrial. By analogy, I would refer to the Privy Council cases of *Brij Bulshan Singh v. R* [1946] AIR PC 38 and *Mamand v. Emperor* [1946] AIR PC 45 which are authorities for the proposition that a statement made under s. 164 of the Indian Criminal Procedure Code (equivalent to the old s. 113 of our Code) used for purposes for impeaching the credit of a witness cannot be used as substantiative evidence. Such a statement can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of Court under the section is true.

It follows, therefore, that the proper approach for the learned President to adopt is this: once the certified copy of the record of proceedings in the original trial is produced and his attention drawn to the alleged difference between what ASP Fariddudin had testified previously and now he will have to decide if it is material. For this purpose, the Chemist could be recalled to ascertain whether there is a material difference between the words "opium" and "an opiate". It should be noted that the provisions as to the presumptions and penalties under the Dangerous Drugs Act, 1952, for opium and heroin can be very different, depending on the quantity of drugs involved.

If the difference is found to be material, then leave to cross-examine should be given and the procedure laid down by Taylor J in the oft quoted case of *Muthusamy v. PP* [1948] MLJ 57 followed.

It is clear from the record provided that the only explanation offered by ASP Fariddudin is a denial that he used the word "opium" at the original trial. So all that needs to be done is to put in the record at the original trial by calling the proper officer of the Court who has custody of the same, presumably, the Registrar, Sessions Court.

After I had explained to Counsel what I thought was the legal position, as outlined above, he asked that no order be made on his application and I acceded to his request.

I have a final point to make. Section 121 of the Act is based on general grounds of convenience and public policy. Obviously, it would cause great inconvenience and perhaps, embarrassment, if Magistrates or Presidents are withdrawn from their own Courts to answer questions as to their own conduct at trials at which they have presided. It follows, that it is only in altogether exceptional circumstances that a special order will be made under the section and that too only when it appears essential to the just decision of a case.

Also found at [1985] 2 CLJ 91